

March 17, 2009

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner: Environmental Defense Institute

Date of Filing: February 24, 2009

Case Number: TFA-0295

On February 24, 2009, Environmental Defense Institute (Appellant) filed an Appeal from a determination issued to it on December 16, 2008, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004.<sup>1/</sup> In its determination, Idaho identified and released numerous documents responsive to the Appellant's request. Most of the documents Idaho provided the Appellant were released in their entirety. The Appellant challenges Idaho's withholding of information from three documents. This appeal, if granted, would require Idaho to release the withheld information to the Appellant.

*I. Background*

On April 10, 2008, the Appellant filed a request with Idaho for documents referring to the Advanced Test Reactor (ATR) that were referenced in DOE/Idaho National Laboratory (INL) "Certification Report No. 29." Request Letter dated April 10, 2008, from Chuck Broschious, President, Board of Directors, Appellant, to Idaho. On December 16, 2008, Idaho released numerous documents in full to the Appellant. Idaho redacted a portion of one document. In its Determination Letter, Idaho stated that the redacted document contains information that is exempt from disclosure under FOIA Exemptions 2 and 3.<sup>2/</sup> Determination Letter dated December 16, 2008, from Clayton Ogilvie, FOIA Officer, Idaho, to Appellant. In addition to the redacted document, Idaho released two single pages of two documents. Those two single pages were responsive to the Appellant's request.

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<sup>1/</sup>The request was submitted on April 10, 2008. Because of the broad scope of the request, Idaho has been sending responsive documents to the Appellant in installments as the documents are reviewed and ready for release.

<sup>2/</sup>Idaho withheld a portion of one other document under Exemption 6. The Appeal Letter did not request this withheld information be released.

On February 24, 2009, the Appellant appealed, contending that the FOIA exemptions that Idaho cited in its Determination Letter do not apply to the document that Idaho has redacted. Appeal Letter at 1 received February 24, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA). The relief requested by the Appellant is unredacted copies of

1. ATR Vessel Vent Valve Installation, EG&G Facility Change Form, 1988; Reactor Vessel Vent System issued 6/22/93, Doc. No. 7.3.12.3.21;
2. Recommendation for Upgrade of Radiation monitoring at the Idaho National Laboratory Reactor Technology Complex, August 2007, ANN, Inc., et al.
3. Chapter 12, Radiological Protection Upgraded Final Safety Analysis Report for Advanced Test Reactor, SAR-153, 2/05/08.

Appeal Letter at 2. The Appellant argued that Exemptions 2 and 3 do not apply to these three documents.<sup>3/</sup> The Appellant claimed that Idaho's assertion that release of the information could lead to sabotage of the ATR Vessel Vent Valve Installation was incorrect because the circumvention element of Exemption 2 "only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individuals may not use them to circumvent the law or law enforcement measures." *Id.* at 3. In regard to Exemption 3, the Appellant argues that the requested documents "do not relate to 'special nuclear fuel.'" *Id.* If the Appeal were granted, these three documents would be released to the Appellant without redactions.

## *II. Analysis*

### *A. Information redacted under Exemptions 2 and 3*

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970)). "An agency seeking to withhold

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<sup>3/</sup>In the Appeal, the Appellant also appears to challenge the withholding under Exemption 6. However, no portions of the three documents which the Appellant has requested to receive in full were withheld under Exemption 6. Therefore, this Decision will not consider the withholding under Exemption 6.

information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9<sup>th</sup> Cir. 1987). It is well settled that the agency’s burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

## 1. Exemption 2

### a. Application of Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). “Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes.” *Judicial Watch, Inc., v. Dep’t of Transp.*, No. 02-566, 2005 WL 1606915, at \*9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (“low two” information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (“high two” information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Idaho has claimed that the information at issue in the present case involves only the second category, “high two” information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the “high two” category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under “high two” must be able to show that (1) the requested information is “predominantly internal,” and (2) its disclosure “significantly risks circumvention of agency regulations or statutes.” *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

Idaho withheld portions of the “ATR Vessel Vent Valve Installation, EG&G Facility Change Form, 1988; Reactor Vessel Vent System issued 6/22/93, Doc. No. 7.3.12.3.21” (ATR Vessel Vent Valve Installation) under FOIA Exemption 2. Idaho explained that this document is internal, and its disclosure would “significantly risk installations and projects that safeguard nuclear materials and facilities.” Determination Letter at 1. Thus, it is exempt from disclosure under Exemption 2. It further stated that Exemption 2’s anti-circumvention protection is applicable in this case because the document identifies “vulnerabilities to sabotage events, system configurations/capabilities that may be exploited and internal procedures for operating the reactor that are inherently internal.” *Id.* Idaho stated that it withheld those portions because disclosure of the information “would significantly risk installations and projects that safeguard nuclear materials and facilities.” *Id.*

We have reviewed an unredacted version of the ATR Vessel Vent Valve Installation document that was released to the Appellant. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that

information which “does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.” *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that Idaho withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the “high two” exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7<sup>th</sup> Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9<sup>th</sup> Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the ATR Vessel Vent Valve Installation and to understand how to sabotage it. Accordingly, disclosure of the information at issue risks circumvention of DOE’s efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. Even though this Appellant may have no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argued that “[t]he ‘circumvention’ exemption only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individual may not use them to circumvent the law or law enforcement measures.” Appeal Letter at 3. We disagree. Exemption 2 encompasses documents that are used for internal purposes not just for law enforcement purposes. *Judicial Watch, Inc.*, 2005 WL 1606915, at \*9. Therefore, because of the hazards involved in public release, we find that the information was properly withheld under the “high two” prong of Exemption 2.

#### b. Segregability

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that Idaho redacted from the ATR Vessel Vent Valve Installation document. Idaho was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

### c. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Idaho claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the ATR Vessel Vent Valve Installation. It is therefore obvious that release of the information would not be in the public interest.

### 2. Exemption 3

Exemption 3 of the FOIA allows agencies to withhold information that is "specifically exempted from disclosure by statute [other than the FOIA itself] provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As articulated by the Supreme Court in *CIA v. Sims*, 471 U.S. 159, 167 (1985), application of Exemption 3 is a two-step process. First, an agency must determine whether the statutory provision in question satisfies the foregoing requirements of Exemption 3, and if so, the agency must next determine whether the subject information falls within the purview of that statutory provision. *Id.*; see also *Kelly, Anderson & Associates, Inc.*, Case No. TFA-0638 (2001).

In its determination, Idaho relied upon the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (AEA), for redacting information from the ATR Vessel Vent Valve Installation document, stating that the AEA "prohibit[s] the disclosure of restricted data to the public specifically related to special nuclear materials." Determination Letter at 1. We have previously determined that the AEA is a statute to which Exemption 3 is applicable. See, e.g., *Beveridge & Diamond, P.C.*, Case No. TFA-0167 (2006). However, in order for information to be withheld under the AEA, it must be properly classified or identified as Unclassified Controlled Nuclear Information (UCNI) under the provisions of the AEA. There is no indication that the information withheld by Idaho in this case has been either properly classified or properly identified as UCNI pursuant to those provisions. Therefore, Idaho improperly invoked Exemption 3 to protect the information requested by the Appellant in this case. We note, however, that the information Idaho withheld pursuant to Exemption 3 was also withheld under Exemption 2 discussed in the above section.

### B. Non Responsive Information in Two Documents

The Appellant argues that Idaho improperly redacted information from two other documents, Recommendation for Upgrade of Radiation monitoring at the Idaho National

Laboratory Reactor Technology Complex, August 2007, ANN, Inc., et al. (Recommendation) and Chapter 12, Radiological Protection Upgraded Final Safety Analysis Report for Advanced Test Reactor, SAR-153, 2/05/08 (Chapter 12). The Appellant points out that only one page from each of these documents was released. The Appellant argues that since only one page was released, the rest of the document was redacted. We contacted Idaho and ascertained that the one page that was released from each document was the only information found to be responsive to the Appellant's request. The remainder of each document was not responsive to the Appellant's request and therefore not released. We have previously found that non-responsive material is not subject to disclosure under the FOIA. *Northwest Technical Resources, Inc.*, Case No. VFA-0611 (2000). Therefore, we shall deny this portion of the Appeal.

### *III. Conclusion*

Idaho improperly relied on the AEA to withhold information under Exemption 3, since there is no indication that the material has been classified or properly identified as UCNI under the AEA. However, the information redacted from the ATR Vessel Vent Valve Installation document was properly withheld under Exemption 2. Further, Idaho is not required to release non-responsive portions of documents that contain responsive information. Therefore, we will deny the Appeal filed by the Environmental Defense Institute.

It Is Therefore Ordered That:

- (1) The Appeal filed by Environmental Defense Institute, Case No. TFA-0295, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: March 17, 2009